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In the
# Supreme Court of the United States

VIVIAN L. HAUSCH,

*Petitioner,*

GRIEVANCE COMMITTEE FOR THE
NINTH JUDICIAL DISTRICT,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether requiring the submission of income tax returns as part of a motion for reinstatement to the practice of law after a six-month suspension is a violation of an attorney's constitutional rights when the grounds for suspension were not directly or indirectly related to financial issues.

Whether a suspended attorney may properly be denied reinstatement to the practice of law when she has been treated differently from other attorneys.

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## ORDERS BELOW

The order of the New York State Court of Appeals, entered June 10, 2008, denying the petitioner's leave to appeal an order of the Appellate Division, Second Department (Appendix A, infra, beg. at p. 1a) is reported at 10 NY3d 713, 891 NE2d 308, 861 NYS2d 273 (2008) and the order of the New York State Court of Appeals, entered September 9, 2008, denying petitioner's reargument motion for leave to appeal (Appendix B, infra, beg. at p. 2a) is reported at 11 NY3D 760, 894 NE2d 1194, 864 NYS2d 804 (2008).

The decision and order on motion for reinstatement of the Appellate Division, Second Department, entered February 22, 2008, denying the petitioner's motion for reinstatement to the practice of law (Appendix C, infra, beg. at p. 3a) is not yet reported.

The decision and order on motion for reinstatement of the Appellate Division, Second Department, entered November 21, 2007, denying the petitioner's application for waiver of the requirement that she submit copies of her income tax returns as part of her application for reinstatement (Appendix D, infra, beg. at p. 5a) is not yet reported.

The opinion and order of the Appellate Division, Second Department, entered November 21, 2006, suspending the petitioner from the practice of law for a period of six months (Appendix E, infra,

beg. at p. 7a) is reported at 2006 NY Slip Op. 8769, 36 AD3d 141, 825 NYS2d 109 (2d Dept. 2006); appeal den. 8 NY3d 801, 861 NE2d 108, 828 NYS2d 292 (2007).

## JURISDICTION

The order of the New York State Court of Appeals denying petitioner's leave to appeal (Appendix A, infra, beg. at p. 1a) was entered on June 10, 2008. A motion for reargument, timely filed, was denied by order of the Court of Appeals (Appendix B, infra, beg. at p. 2a) entered on September 9, 2008. The jurisdiction of this Court is invoked under the provisions of 28 USC 1257(3).

In her motions for leave to appeal to the Court of Appeals, the petitioner was seeking leave to appeal the decision and order on reinstatement of the Appellate Division, Second Department, entered February 22, 2008, which denied the petitioner's motion for reinstatement to the practice of law after a six-month suspension because the petitioner refused to submit her income tax returns as part of her application.

Pursuant to New York State Civil Practice Laws and Rules (hereinafter "CPLR" 5601(b): "An appeal may be taken to the Court of Appeals as of right from an order of the appellate division which finally determines an action where there is directly or indirectly involved the construction of the constitution of the state or of the United States...."

The construction of the Constitution was at issue because the Court of Appeals had to decide whether the Constitution permits the Second Department to force the disclosure of income tax returns when a suspended attorney has done nothing to bring them into relevancy.

Although the first issue on appeal to the Court of Appeals constituted an appeal as of right, the petitioner filed a motion for leave to appeal as opposed to a notice of appeal because there were two other issues, issues which could not be appealed as of right: the Second Department is the only department in the state that mandates a form affidavit and disclosure of income tax returns after a six-month suspension and there were numerous improprieties toward the petitioner throughout the proceedings, the latter of which are also addressed herein.

A motion for leave to appeal to the Court of Appeals that is properly an appeal as of right is not dismissed by the Court. The motion is accepted and deemed by the Court of Appeals an appeal as of right. CPLR 5520(b) states in relevant part: "Appeal by permission instead of as of right. An appeal taken by permission shall not be dismissed upon the ground that the appeal would lie as of right...."

The federal question was presented to the highest court in New York having jurisdiction, the Court of Appeals, both in the motion for leave to appeal and the reargument motion.

It was necessary for the Court of Appeals to decide the federal question because an appeal to the Court of Appeals may be taken as of right from an order where the construction of the Constitution is directly or indirectly involved. To deny the motion for leave to appeal, the Court of Appeals had to consider the petitioner's constitutional argument that requiring her to submit her income tax returns as part of her motion for reinstatement to the practice of law when disclosure of those documents is not required for admission to the bar and the petitioner did nothing to bring them into relevancy constituted a violation of the petitioner's constitutional rights as well as her rights under Internal Revenue Code 6103, 26 USC 6103.

The petitioner presented her arguments to the Appellate Division, Second Department, in two separate affidavits that were part of her application for reinstatement.

Petitioner's federal claims were thus made at the earliest opportunity and were renewed at each stage below.

For the foregoing reasons, the Court has jurisdiction over the first issue in the instant case. The Court has jurisdiction over the other issue herein as overseer of the courts in the country.

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Const. Amend. IV
U.S. Const. Amend. V
U.S. Const. Amend. IX

U.S. Const. Amend. XIV, sect. 1
26 U.S.C. 6103
28 USC 1257 (3)
28 USCS 1257 (b)
22 NYCRR 491.4 (e)
22 NYCRR 603.14
22 NYCRR 691.1 (e)
22 NYCRR 691.5
22 NYCRR 806.12
22 NYCRR 1022.28
CPLR 5520(b)
CPLR 5601 (b)

## STATEMENT

A writ of certiorari is respectfully sought to review the New York State Court of Appeals order denying the petitioner leave to appeal an order of the Appellate Division, Second Department, entered February 22, 2008, which denied the petitioner's motion for reinstatement to the practice of law after she was suspended for a period of six months. (Appendix C, infra, beg. at p. 3a).

The petitioner is an attorney admitted to practice in the United States Supreme Court and suspended from practice in New York by order of the Appellate Division, Second Department, entered November 21, 2006. (Appendix E, infra, beg. at p. 7a).

As the Appellate Division order indicates, the petitioner had been practicing law for twenty years at the time she was suspended. This disciplinary

action is the first and only such action brought against her.

The grounds for the petitioner's suspension were not related to financial issues in any way. The petitioner did not damage anyone in any way, financially or otherwise, nor was this ever an issue.

The Second Department requires a prescribed affidavit and disclosure of income tax returns on motion for reinstatement to the practice of law after a suspension of six months or less. 22 NYCRR 691.11 (Appendix L, infra, beg. at p. 24a). The First, Third, and Fourth departments do not require a form affidavit or disclosure of income tax returns as part of a motion for reinstatement after a six-month suspension. (22 NYCRR 603.14, Appendix M, infra, beg. at p. 33a; 22 NYCRR 806.12, Appendix N, infra, beg. at p. 34a; 22 NYCRR 1022.28, Appendix O, infra, beg. at p. 36a, respectively).

The petitioner submitted the required affidavit but refused to attach her tax returns.

## How the Federal Question Was Raised

The petitioner submitted two supplemental affidavits presenting her arguments as to why disclosure of her income tax returns was improper. Those affidavits dated September 29, 2007, and December 18, 2007, argued her right to privacy and relevancy issues.

The Appellate Division, Second Department, denied the petitioner's motion for reinstatement because she did not submit her income tax returns.

The constitutional issue was addressed as the first issue in the petitioner's motion for leave to appeal to the Court of Appeals and in her reargument motion to the Court of Appeals.

The petitioner addressed the improprieties of the village justice, the grievance committee, the special referee, and the appellate division as the third issue in her motions to the Court of Appeals. Those issues were also part of the record in the Appellate Division.

## REASONS FOR GRANTING THE WRIT

I. *Requiring the Submission of Income Tax Returns as Part of a Motion for Reinstatement to the Practice of Law Is a Violation of an Attorney's Constitutional Rights When the Grounds for Suspension Were Not Directly or Indirectly Related to Financial Issues.*

The blanket requirement of the Appellate Division, Second Department that attorneys suspended from the practice of law for a period of six months or less must submit their income tax returns in order to be reinstated to practice creates profound problems for attorneys in that position.

The attorneys must choose between giving up their constitutional rights and giving up their profession, their livelihood.

Practicing law is a privilege, not a right, just as having a license to drive a motor vehicle is a privilege, not a right. No one would support promulgating a rule that a person with a suspended driver's license must submit their income tax returns in order to have their license reinstated.

The right to hold private one's income tax returns is a right guaranteed by the United States Constitution and the Internal Revenue Code.

Although the Constitution does not contain the words "right to privacy," pursuant to the Ninth Amendment, "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." The Fourth and Fifth amendments protect against all government invasions "of the sanctity of...the privacies of life." *Boyd v. United States*, 116 US 616 (1886). The Fourth Amendment creates a right to privacy "no less important than any other right carefully and particularly reserved by the people." *Mapp v. Ohio* 367 US 643 (1961).

The Internal Revenue Code 6103 specifically states that tax returns are confidential: "General rule. Returns and return information shall be confidential...." 26 USC 6103.

The Fourteenth Amendment protects an individual from a state action that deprives him or her of a protected "liberty" or "property" interest and includes the right to privacy as part of the right to personal liberty restricting state action.

The Fourth Circuit has reviewed a case presenting the issue of whether a disbarred attorney's petition for reinstatement was properly denied. *In the Matter of Maurice Louis Braverman*, 549 F.2d 913 (4th Cir. 1976).

This Court has held in favor of a bar applicant and against a state bar when state bar actions have unconstitutionally restricted an individual's efforts to be admitted to the bar. *Baird v. State Bar of Arizona,* 410 US 1 (1971). Being reinstated to practice is analogous to being admitted to the bar.

The strict scrutiny standard ought to be applied because the petitioner was deprived of her fundamental right to privacy. Accordingly, the Second Department's requirement would have to be narrowly tailored and a compelling state interest strong enough to warrant the abridgement would have to be shown. It was not.

The application for reinstatement for an attorney suspended for a period of six months or less states in relevant part:

"20. Since the imposition of discipline, I have filed all required Federal, state, and local income tax returns when due or have received an extension to file the same, except as follows:

*Copies of all such returns are attached as exhibit ___hereto.*" (Appendix I, infra, beg. at p. 24a).

As drafted by the Second Department, the wording of the paragraph indicates that what is

required is proof of timely filing. The petitioner herein swore under oath that she had timely filed her returns and argued that proof from the Internal Revenue Service and the New York State Department of Taxation and Finance would properly fulfill her obligations. The petitioner then applied for a waiver of the requirement, which was denied. The petition submitted proof from the Internal Revenue Service and requested additional time to submit proof from the state. By letter dated January 2, 2008, the clerk of the Appellate Division, Second Department, advised the petitioner that this would not be accepted by the Court. (Appendix F, infra, beg at p. 17a).

The waiver was denied by decision and order on motion for reinstatement entered November 21, 2007 (Appendix D, infra, beg. at p. 5a).

The petitioner's motion for reinstatement was denied by decision and order on motion for reinstatement entered February 22, 2008, because the petitioner did not submit her income tax returns (Appendix C, infra, beg. at p. 3a).

The clerk of the Appellate Division, Second Department, did not articulate a compelling state interest in the petitioner's income tax returns. He simply said they are required. The Appellate Division, Second Department, did not articulate a compelling state interest in the petitioner's income tax returns. It only denied her application for a waiver of the requirement and denied her motion after she refused to submit the returns.

The Second Department's interest is unidentified. An unidentified state interest does not meet the high constitutional standard of compelling state interest required to abridge an individual's right to privacy.

II. *An Attorney May Not Properly Be Denied Reinstatement to the Practice of Law When She Has Been Treated Differently From Other Attorneys.*

The respondent has accused the petitioner of trying to get special treatment from the courts, arguing she "should be held to the same standard of compliance every other attorney who seeks reinstatement is made to comply with."

On the contrary, just the opposite is true. The petitioner has been seeking equal treatment from the beginning, starting with the judge who initiated the disciplinary action against the petitioner.

*Justice Court, Village of Tuckahoe*
*Hon. David Otis Fuller, Jr.*

Judge Fuller initiated the disciplinary action against the petitioner. He presided over two criminal trials against the petitioner and one against her corporate client, P&N Tiffany Properties Inc., the owner of a commercial building on Main Street in the village.

The petitioner was accused of operating her law office at the subject premises without a certificate of occupancy, allegedly a violation of state

code; her corporate client was accused of allowing her to do so, allegedly a violation of Tuckahoe code.

After the first trial, a bench trial, Judge Fuller found both guilty despite evidentiary insufficiency. He assessed a penalty in excess of five thousand dollars against the corporation for the Tuckahoe violation and a penalty in excess of six thousand dollars against the petitioner for the state violation. Pursuant to the Tuckahoe court's rules, which have since been changed at the insistence of the village board, both fines were paid in cash.

Judge Fuller's monthly report for May 2001 (state form AC-1030 [sei]) reported the state violation as a village ordinance violation. The amount of the fines was omitted and reported as "restitution," even though no one had been damaged. None of the over eleven thousand dollars was reported or submitted to the state as required.

The convictions were reversed on appeal. *People v. P&N Tiffany Properties Inc.*, 2002 Slip Op. 40361(V), 2002 NY Misc. LEXIS 1066 (Appellate Term, 9th and 10th Jud. Dists. 2002); *People v. Hausch*, 2002 Slip Op. 20360(V), 2002 NY Misc. LEXIS 1063 (Appellate Term, 9th & 10th Jud. Dists. 2002). In the first order, the Court went out of its way to state there was no law office on the premises.

The petitioner and her corporate client had to move for a contempt order to get their money back.

That should have been the end, but it was not. After the reversals, two more informations were

issued against the petitioner alleging the same violations as before, two misdemeanors.

Judge Fuller denied the petitioner's omnibus motion, citing *People v. Giles*, 73 NY2d 666, to rule against her double jeopardy argument. This case does not address double jeopardy.

The Appellate Term reversed the convictions based on double jeopardy. *People v. Hausch*, 3 Misc.3d, 777 NYS2d 829 (App. Term, 9th & 10th Jud. Dists. 2004).

Before the second trial, the judge offered the petitioner assigned legal counsel if she could not afford an attorney. However, he denied her written demand for a jury trial in violation of her right to a jury trial and in contradiction of his own ruling in *People v. Musante*, 141 Misc.2d 300 (Justice Ct., Tuckahoe, 1988): "Because the defendants are being charged with a misdemeanor, then, they are entitled to a jury trial."

Immediately after that last trial, Judge Fuller found the petitioner guilty. In an emotional ruling, in open court, he assessed a total of over forty thousand dollars in fines, although he forgot to hand down a verdict on one of the charges, and said he would report the petitioner to the Grievance Committee—in the petitioner's opinion, an abuse of his position on that committee. This time, the petitioner sought and received a stay.

*The Grievance Committee*
*for the Ninth Judicial District*

The suspension order of the Appellate Division, Second Department, states that the disciplinary action against the petitioner stemmed from violations of village zoning ordinances. This is not accurate. The action stems from alleged disobeying of court orders in an Article 78 proceeding in New York State Supreme Court.

After the Appellate Term again reversed the verdicts handed down by Judge Fuller, that should have been the end but it was not. The Grievance Committee searched for other grounds on which to base a disciplinary action. Judge Fuller did not file a formal complaint, but instead had the committee initiate a *sua sponte* complaint.

Pursuant to the Rules of the Appellate Division, Second Department, once a *sua sponte* complaint has been issued by the committee, the full committee of 20 members must meet and vote. 22 NYCRR 691.4(e) (Appendix P, infra, beg. at p. 37a). A majority vote of the full committee of 20 is required before taking further action. 22 NYCRR 691.1(e) (Appendix P, infra, beg. at p. 37a).

In the petitioner's case, only a quorum met. A quorum is two members. 22 NYCRR 691.4(d) (Appendix Q, infra, beg. at p. 38a). It is unknown whether Judge Fuller was one of the two, or, if not, what communication he may have had with them.

The result was that the committee made application to the Appellate Division to have the

petitioner immediately suspended from the practice of law. 22 NYCRR 691.4(e)(5) (Appendix P, infra, beg at p. 37a). To do this the committee had to falsely state that the petitioner had made no opposition when, in fact, she had submitted hundreds of pages of rebuttal evidence.

The committee also withheld information from the Appellate Division: that the petitioner was not ordered to do anything other than serve a paper, which she did; that she had obtained a stay from the Appellate Division; that the issues were continuously before the court below; that there was no court appearance so that the charge relating to disobeying an order issued at trial should have failed on that ground alone; that a certificate of occupancy had been applied for by the petitioner's corporate client, the owner of the building; that the building was used only as a mailing address by the petitioner and then not even that after Judge Fuller's initial guilty verdict, even though his verdict was reversed in its entirety on appeal.

The Appellate Division did not immediately suspend the petitioner but improperly denied the petitioner's motion to turn over the matter to the full committee as required by its own rules.

The committee's investigator, Patrick A. Smith, admitted in a sworn affidavit dated November 23, 2004, that he went through the petitioner's mail at her home, which is a violation of postal rules and federal law. Before the hearing, he caused an unwarranted, illegal, unconstitutional police stop of the petitioner's vehicle by four Putnam

County Sheriff's patrol cars. The Sheriff Department report for June 17, 2005 shows that Patrick Smith had caused the officers to interrupt a warrant arrest by misrepresenting who he was and his purpose. After the vehicle was stopped, Patrick Smith admitted that it was only a civil matter of serving papers, and the officers said they should not be involved.

At that point, Patrick Smith went to the driver's side of the petitioner's vehicle and started yelling loudly and shaking uncontrollably. He was trying to serve not the petitioner but her passenger, which he failed to do.

Apparently, Mr. Smith had been following the petitioner around in his van. The petitioner had previously seen someone matching his description in front of her home. The man was parked across the street early in the morning on at least two occasions. When the petitioner failed to notice him when she put out her garbage, he noisily started his vehicle and drove by her slowly, staring at her out of the driver's side window.

In his motion papers to the Appellate Division, the new attorney for the respondent misrepresented so many facts that the petitioner could only mark his papers with corrections and request additional time to submit a more orderly presentation, which she was denied.

In responding to the petitioner's motion for reinstatement, the attorney refused to admit that his investigator had served papers on the petitioner in

the middle of the annual New York State Bar Association Update seminar on December 5, 2006, and that he had called the bar association to verify the petitioner's attendance. Instead, he alleged the petitioner had "conveniently mislaid" her certificate and suggested that the petitioner had lied about her attendance at the seminar and her having fulfilled the education requirements for suspended attorneys. The petitioner found the certificate and submitted it to the Appellate Division, but previously had submitted proof of more than the required credits without it.

*Grievance Committee Attorney*
*Forrest Strauss, Esq.*

The attorney who submitted the papers to the Appellate Division with so many misrepresentations that the petitioner could only mark the corrections is Forrest Strauss, Esq.

According to the Verizon telephone book, there was an extraordinary and disproportionate number of Strausses in the Village of Tuckahoe, a village of less than a square mile, but the Special Referee refused to do anything about it. The telephone book also shows a family of Strausses in the condominium adjacent to that of the Special Referee in Heritage Hills.

In papers to the Court of Appeals, Mr. Strauss presented copies of the rules of the First, Third, and Fourth departments of the Appellate Division pertaining to attorneys suspended for over six months and said they pertained to attorneys suspended for six months or less. Other

misrepresentations to that court are addressed in the petitioner's reargument affidavit and brief and are too extensive to repeat here.

Mr. Strauss's reward for his work was a position on the bench, a position as the village justice that was newly created and given to him. The petitioner does not know whether Judge Fuller, the head of the New York Magistrate's Association, had any part in this.

*Special Referee*
*Hon. Lawrence Tonetti*

In New York, a disciplinary action is a quasi-criminal action.

The petitioner's defense at the hearing was hindered by the improper quashing of two subpoenas executed for the petitioner by the clerk of the Appellate Division, Second Department, pursuant to its rules 22 NYCRR 691.5(a) (Appendix R, infra, beg. at p. 39a) and served on Alan Steiner, the respondent's chairman at the time the respondent initiated its complaint against the petitioner, and Patrick Burke, chairman at the time of the hearing.

Judge Tonetti ruled that neither party had to appear to testify even though (a) they were the committee chairmen and the committee was a party to the action, (b) the Appellate Division Clerk had executed the subpoenas for their testimony, (c) they had not moved to quash the subpoenas or otherwise appeared before Judge Tonetti, and (d) Judge Tonetti admitted he probably did not have the discretion to quash them. Judge Tonetti went so far

as to state that the petitioner was "right under the law" that they had to appear to testify, but he would "do it anyway."

Judge Tonetti stated: "My job here is to listen to the facts that are elicited from both sides and to report to the Appellate Division my findings with respect to the facts of the charges that are laid before you."

However, Judge Tonetti did not in fact do this. Rather, he simply rubber stamped the charges as presented by the petitioner. Judge Tonetti made no report in that he made no findings at all in his report about the petitioner. The only findings about the petitioner were made by Judge Tonetti on the record, on the second day of the hearing on June 28, 2005. That finding was in favor of the petitioner, even though he later sustained the four of eight charges not withdrawn by the respondent. The judge stated: "The thing that troubles me most is, again, finding against you is so difficult because you are sincere and you are so conscientious and you've been fighting this thing on constitutional grounds and I respect you for it." He continued: "You're not just a person, in my opinion, who comes in here and says: 'Screw you, Charlie, I'm not going to abide by any of the rules, I can do whatever I want. You're not that kind of lawyer and I can see from all the work you have done that you have tried hard to follow your beliefs and your understandings of the Constitution and the Code of Ethics, et cetera.'"

The only witness at the hearing was the petitioner, who testified after objecting on the

ground that she had not been served with a subpoena. She testified because Judge Tonetti said he would draw a negative inference if she did not testify. He later stated his understanding that if a person is in the room, they can be called to testify.

The petitioner testified fully as to all matters not protected by the attorney-client privilege. However, by taking the stand the petitioner gave the respondent the opportunity to put into evidence, over objection, voluminous papers that had nothing to do with the charges. In fact, the respondent never showed how they were relevant, either at the hearing or in papers to the Appellate Division. The wording of the Appellate Division order of suspension shows the Court found the volume of papers impressive. (Appendix E, infra, beg. at p. 7a).

Although Judge Tonetti said he was not familiar with the Village of Tuckahoe, he somehow had gained the knowledge that the subject building had previously housed a fish store by the name of Tuckahoe Seafood, a name that was not in any court paper or testimony.

*Appellate Division, Second Department*
*James Edward Pelzer, Esq.*

The petitioner is aware of no other attorney who has been suspended from the practice of law by the Appellate Division, Second Department, or any other appellate division for that matter, for the charges as set forth by the respondent.

Even if the specifications were accurate, no attorney would be asked to supply information about

one's corporate client protected by attorney-client privilege and certainly not charged, much less suspended, for not appearing for deposition testimony without having been served with a subpoena (Charge One); an attorney would be fined, not suspended, for disobeying a court order and it would not be assumed without any evidence the attorney ever told the client to disobey a court order (Charges Two, Three) or for disobeying a court order given at trial when there was no trial or other court appearance for that matter (Charge Three); an attorney would not be suspended for using an office as a mail drop while she waited for the local judge to make a determination as to the building inspector's allegations (Charge Eight).

Like the Special Referee's report, the Appellate Division order suspending the petitioner addressed none of the constitutional or other legal arguments or the factual sufficiency of any of the respondent's purportedly relevant documents. (Appendix E, infra, beg. at p. 7a).

This is not the first time the petitioner has had an unusual experience with the Appellate Division, Second Department, in a case that involved the Village of Tuckahoe.

Before the petitioner was suspended, she had represented herself and her corporate client in six appeals decided before that time by the Appellate Division, Second Department. With the exception of an appeal involving a dispute of less than a thousand dollars, Mr. Pelzer assigned all of the cases to a panel that included Justice Howard Miller,

sometimes as presiding justice. Sometimes there was an inordinate amount of time between the date the appeal was perfected and the date it was calendared.

The connection between the six cases was that the Village of Tuckahoe and/or its public officials were the defendants or respondents in the court below and prevailed in each appeal.

The cases assigned to Justice Howard Miller were: *Hausch v. Clarke, Maron, Williams, and the Village of Tuckahoe*, 298 AD2d 429, 798 NYS2d 264 (2d Dept. 2002); *Hausch v. Clarke, Maron, Williams, and the Village of Tuckahoe*, 8 AD3d 436, 779 NYS2d 123 (2d Dept. 2004); *In the Matter of P&N Tiffany Properties Inc. v. Williams and the Village of Tuckahoe*, 754 NYS 2d 907 (2d Dept. 2003) (the case at issue in Charge Two and Charge Three); *P&N Tiffany Properties Inc. v Maron, Williams, and the Village of Tuckahoe*, 16 AD3d 395, 790 NYS2d 396 (2d Dept. 2005), appeal den. 5 NY3d 757, 834 NE2d 1259, 801 NYS2d 249 (2005); *P&N Tiffany Properties Inc. v. Maron, Williams, and the Village of Tuckahoe*, 33 AD3d 61, 817 NYS2d 345 (2d Dept. 2006); appeal granted 7 NY3d 713, 857 NE 1137, 824 NYS 2d 606 (2006).

As indicated, the Court of Appeals granted leave to appeal in one case, the last listed above.

On appeal, the Appellate Division upheld the ruling of the court below but on different grounds. At issue was the constitutionality of the defective notice published in the newspaper meant to give notice of a public hearing to amend the section of the

zoning code under which the petitioner and her corporate client had been fined by Judge Fuller.

Justice Howard Miller was the presiding justice. The Court upheld the lower court but had to reverse itself to do so. Previously, the Second Department was in accord with two other departments in the state. The case the Court relied on to hold that the plaintiff's case was barred by the four-month statute of limitations was the same case the court had relied on to hold the contrary position.

The Court did not explain why the case now directed a contrary position.

Less than a month after the Court of Appeals granted leave to appeal, the Appellate Division suspended the petitioner. She had to withdraw from the case and, although the appeal had been perfected, the appeal was dismissed.

Justice Howard Miller was on the panel that decided the crucial issue herein, whether the petitioner would be granted a waiver of the requirement that she submit her income tax returns as part of her motion for reinstatement to the practice of law. (Appendix D, infra, beg. at p. 5a).

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari ought to be granted.

Dated: White Plains, New York
December 5, 2008

Respectfully submitted,

Vivian L. Hausch
*Pro Se Petitioner*
305 Central Avenue
White Plains, NY 10606

APPENDIX A

**State of New York,**
**Court of Appeals**

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the tenth day of June 2008

Present, HON. JUDITH S. KAYE,
*Chief Judge, presiding.*

---

2 Mo. No. 483

In the Matter of Vivian L. Hausch, &c.,

*Appellant.*

---

A motion for leave to appeal to the court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

APPENDIX B

**State of New York,**
**Court of Appeals**

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the ninth day of September 2008

Present, HON. JUDITH S. KAYE,
*Chief Judge, presiding.*

---

2 Mo. No. 915

In the Matter of Vivian L. Hausch, &c.,

*Appellant.*

---

A motion for reargument of motion for leave to appeal to the court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Stuart M. Cohen
Stuart M. Cohen
Clerk of the Court

APPENDIX C

**Supreme Court of the State of New York**
**Appellate Division: Second Department**

M66712
E/nl

A. GAIL,PRUDENTI P.J.
REINALDO E. RIVERA
ROBERT A. SPOLZINO
PETER B. SKELOS
ANITA R FLORIO, JJ.

---

2004-06204

In the Matter of Vivian L. Hausch, a suspended attorney.

(Attorney Registration No. 2068641)

---

DECISION AND ORDER ON MOTION
FOR REINSTATEMENT

Motion by the respondent, Vivian L. Hausch, for reinstatement as an attorney and counselor-at-law. By decision and order on motion of this court dated October 14, 2004, that branch of the Grievance C9ommittee's motion seeking the respondent's immediate suspension was denied, the Grievance Committee was authorized to institute and prosecute a disciplinary proceeding against her, and the issues raised were referred to the Honorable Lawrence Tonetti, as Special Referee, to hear and report. By opinion and order of this court dated November 21,

2006, the respondent was suspended from the practice of law for a period of six months, commencing December 21, 2006. By decision and order on motion of this court dated November 21, 2006, the respondent's request for a waiver of the requirement that she submit copies of her income tax returns in connection with motion for reinstatement was denied and her motion for reinstatement was held in abeyance for a period of 30 days pending the respondent's submission of her income tax returns. The respondent was admitted to the bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on July 30, 1986.

Upon the papers filed in support of the motion and the papers filed in relation thereto, it is

ORDERED that the motion is denied.

PRUDENTI, P.J., RIVERA, SPOLZINO, SKELOS and FLORIO, JJ.

SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION SECOND DEPT

I, JAMES EDWARD PELZER, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared this copy with the original filed in my office on 2/20/08 and that this copy is a correct transcription of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on 2/22/08

February 22, 2008

ENTER:

James Edward Pelzer
Clerk of the Court

MATTER OF HAUSCH, VIVIAN L.

APPENDIX D

Supreme Court of the State of New York
Appellate Division: Second Department

M62641
E/nl

A. GAIL,PRUDENTI P.J.
REINALDO E. RIVERA
ROBERT A. SPOLZINO
PETER B. SKELOS
ANITA R FLORIO, JJ.

---

2004-06204

In the Matter of Vivian L. Hausch, a suspended attorney.

(Attorney Registration No. 2068641)

---

DECISION AND ORDER ON MOTION
FOR REINSTATEMENT

Motion by the respondent, Vivian L. Hausch, for reinstatement as an attorney and counselor-at-law and application for a waiver of the requirement that she submit copies of her income tax returns in connection with her application for reinstatement. The respondent was admitted to the bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on July 30, 1986. By decision and order on motion of this court dated October 14, 2004, that branch of the Grievance Committee's motion seeking the respondent's

immediate suspension was denied, the Grievance Committee was authorized to institute and prosecute a disciplinary proceeding against her, and the issues raised were referred to the Honorable Lawrence Tonetti, as Special Referee to hear and report. By opinion and order of this court dated November 21, 2006, the respondent was suspended from the practice of law for a period of six months, commencing December 21, 2006.

Upon the papers filed in support of the motion for reinstatement and application for a waiver, and the papers filed in response thereto, it is

ORDERED that the application for a waiver is denied; and it is further,

ORDERED that the motion for reinstatement is held in abeyance for a period of 30 days pending the respondent's submission of her income tax returns.

SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION SECOND DEPT
PRESENT: Hon. MILLER, SCHMIDT, CRANE and RIVERA, JJ.
I, James Edward Pelzer, Clerk of the Appellate Division of the Supreme Court of the Second Judicial Department, do hereby certify that I have compared the annexed with the original filed in my office on 11/21/07 and that the same is a correct transcription of said original
IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on 11/23/07
ENTER:
James Edward Pelzer
Clerk of the Court

November 21, 2007

APPENDIX E

Supreme Court of the State of New York
Appellate Division: Second Department

D12230
A/hu

_____AD3d_____

A. GAIL,PRUDENTI P.J.
ANITA R. FLORIO
ROBERT W. SCHMIDT
THOMAS A. ADAMS
STEPHEN A. CRANE, JJ.

---

2004-06204

In the Matter of Vivian L. Hausch, a suspended attorney.

(Attorney Registration No. 2068641)

---

OPINION & ORDER

DISCIPLINARY proceeding instituted by the Grievance Committee for the Ninth Judicial District. By decision and order on motion of this court dated October 15, 2004, that branch of the Grievance Committee's motion which was to immediately suspend the respondent was denied, the Grievance Committee was authorized to institute and prosecute a disciplinary proceeding against her, and the issues raised were referred to the Honorable Lawrence Tonetti, as Special Referee to expeditiously hear and

report. The respondent was admitted to the Bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on July 30, 1986.

Gary L. Casella, White Plains, N.Y. (Forrest Strauss of counsel), for petitioner.

Vivian Hausch, White Plains, N.Y., respondent pro se.

PERCURIAM.

The Grievance Committee served the respondent with a petition dated July 19, 2004, containing eight charges of professional misconduct. The respondent served an answer dated November 30, 2004, essentially denying the charges, and asserting affirmative defenses. Following preliminary conferences on December 21, 2004, and April 26, 2005, a hearing was held on June 21, 2005, and June 28, 2005. The petitioner called the respondent as a witness and submitted 40 exhibits into evidence. The respondent appeared pro se, testified on her own behalf and submitted six exhibits into evidence. The petitioner withdrew Charges Four, Five, Six, and Seven. The Special Referee sustained Charges One, Two, Three, and Eight. The petitioner now moves to confirm the findings of the Special Referee and for the imposition of such discipline as to this court seems just and proper. The respondent cross-moves for an order, inter alia, disaffirming the Special Referee's report insofar as it sustains Charges One, Two, Three, and Eight, striking the Summary of Testimony set forth in the motion to confirm or, in the alternative,

granting the respondent additional time to submit a corrected version of the Summary of Testimony.

The charges are predicated upon the respondent's conduct and the litigation arising with respect to the Village of Tuckahoe's enforcement of its zoning code regarding the use and occupancy of a storefront premises located at 99 Main Street, owned by the respondent's client, P&N Tiffany Properties, Inc. (hereinafter P&N). The charges also arise from the respondent's failure to comply with the Grievance Committee's requests for specific information regarding her client, P&N, and that she appear at its offices to testify under oath regarding these matters. Charge One alleges that the respondent engaged in conduct that adversely reflects on her fitness to practice law and that is prejudicial to the administration of justice by failing to cooperate with the lawful demands of the Grievance Committee, in violation of Code of Professional Responsibility DR 1-102(a)(5) and (7) (22 NYCRR 1200.3[a][5],[7]).

By letter dated April 6, 2004, the Grievance Committee requested information from the respondent. By letter dated April 12, 2004, the respondent submitted a response but refused to provide certain information requested by the Grievance Committee.

By letter dated May 5, 2004, the Grievance Committee directed the respondent to provide specific information, including what, if any, ownership interest she has or had in P&N, if she

was, or ever had been, an officer or director of P&N, the name of all other shareholders/officers of P&N, to explain any relationship she had with the shareholder/officers of P&N, and if she represented P&N or any of the officers in any other legal matters.

By letter dated May 15, 2004, the respondent submitted a response but refused to provide certain information requested by the Grievance Committee.

By letter dated May 17, 2004, the Grievance Committee required the respondent to appear at its office on June 8, 2004.

In a response dated May 22, 2004, the respondent inquired, inter alia, whether she was being required to appear for a hearing pursuant to 22 NYCRR 691.4(e)(4) and (f).

By letter dated May 26, 2004, the Grievance Committee advised the respondent that the sua sponte complaint was not meant to constitute written charges pursuant to 22 NYCRR 691.4(e)(4). By letter dated June 3, 2004, the respondent advised the Grievance Committee that she would not be appearing on June 8, 2004.

By letter dated June 4, 2004, the Grievance Committee advised the respondent that 22 NYCRR 691.5(b) authorized the Committee during investigations to take her sworn testimony. The respondent failed to appear at the offices of the Grievance Committee and provide sworn testimony on June 8, 2004.

By letter dated June 9, 2004, the respondent acknowledged receipt of the Grievance Committee's June 4, 2004, letter.

Charge Two alleges that the respondent engaged in conduct prejudicial to the administration of justice by failing to timely comply with one or more court directions in violation of Code of Professional Responsibility Code of Professional Responsibility DR 1-102(a)(5) (22 NYCRR 1200.3[a][5]).

The respondent represented P&N *in Matter of P&N Tiffany Properties, Inc. v. Williams,* commenced in the Supreme Court, Westchester County, under Index No. 8572101.

By order dated July 16, 2001, the Supreme Court, Westchester County, directed the building inspector of the Village of Tuckahoe, within five days of receipt of the order, to arrange for the inspection of the subject premises and the issuance of a Certificate of Occupancy.

By order dated October 17, 2001, the Supreme Court directed P&N to conform to the order by permitting an inspection of the subject property.

By order dated November 30, 2001, the Supreme Court directed "[C]ounsel and her client" to comply with the outstanding orders of the court and indicated a willingness to entertain motions for contempt.

By order dated January 30, 2002, the Supreme Court held P&N in contempt of the three orders dated July 16, 2001, October 17, 2001, and November 30, 2001, and directed that the subject premises be made available for inspection. A time and date was set for the inspection.

By decision and order on motion of this court dated March 5, 2002, a stay of enforcement of the orders dated July 16, 2001, November 30, 2001, and January 30, 2002, was granted pending the hearing and determination of appeals from those orders.

By decision and order dated February 10, 2003, this court affirmed the orders dated July 16, 2001, and November 30, 2001, found no merit to the argument that the inspection requirement had been waived, and held that the orders dated July 16, 2001, and November 30, 2001, were proper (see Matter of P&N Tiffany Properties v Williams, 302 AD2d 466). This court further stated that "The court-ordered remedy was appropriate in light of the petitioner's demand in its petition." This court reversed the January 30, 2002, order to the extent that it held P&N in contempt because it did not comply with the 10-day notice and warning requirement.

The respondent moved in this court for reargument and/or leave to appeal to the Court of Appeals. By decision and order on motion dated May 9, 2003, this court denied the motion.

On September 16, 2003, the New York Court of Appeals denied the respondent's motion for leave to appeal (see *Matter of P&N Tiffany Properties v Williams*, 100 NY2d 512).

The respondent and her client failed to comply with the court's orders.

Charge Three is predicated upon the facts of Charge Two and alleges that the respondent violated Code of Professional Responsibility DR 7-106(a) (22 NYCRR 1200.37[a]) by disregarding and/or advising her client to disregard a ruling of a tribunal made in the course of a proceeding.

The respondent disregarded and/or advised her client to disregard one or more of the above-mentioned rulings of a tribunal made in the course of a proceeding.

Charge Eight alleges that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation by making conflicting representations regarding the location of her law office in violation of Code of Professional Responsibility DR 1-102-(a)(4) (22 NYCRR 1200.3[a][4]).

The respondent submitted an affirmation in *Matter of P&N Tiffany Properties, Inc. v. Williams*, to the Supreme Court, Westchester County, alleging that she "never opened her law office" at 99 Main Street, Tuckahoe, N.Y.

By letter dated September 10, 2003, the respondent denied having a law office at that address to the Grievance Committee.

The respondent indicated or implied that she had a law office at 99 Main Street, Tuckahoe, N.Y., to one or more of the following:

a. The Building Inspector of the Village of Tuckahoe, by letters dated May 4, 2000, and October 10, 2000.

b. The Department of State of the State of New York by certificate of incorporation of T. Pie.

c. The Office of Court Administration of the State of New York by her attorney registration.

Based upon the relevant decisions and orders of the Supreme Court, Westchester County, and of this court, together with the respondent's admissions and the evidence adduced, the Special Referee properly sustained Charges One, Two, Three, and Eight. Accordingly, the petitioner's motion to confirm the Special Referee's Report is granted and the respondent's cross motion is denied.

In determining an appropriate measure of discipline to impose, the petitioner informs the court that its records reveal no prior disciplinary history against the respondent.

The respondent is suspended for six months for her professional misconduct.

PRUDENTI, PJ., FLORIO, SCHMIDT, ADAMS and CRANE, JJ., concur.

ORDERED that the petitioner's motion to confirm the Special Referee's report with respect to Charges One, Two, Three, and Eight is granted and the respondent's cross motion is denied; and it is further,

ORDERED that the respondent, Vivian L. Hausch, is suspended from the practice of law for six months, commencing December 21, 2006, with leave to apply for reinstatement upon the expiration of said period, upon furnishing satisfactory proof that during said period she (a) refrained from practicing or attempting to practice law, (b) fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended, and resigned attorneys (22 NYCRR 691.10), (c) complied with the applicable continuing legal educational requirements of 22 NYCRR 691.11 (c)(2), and (d) otherwise properly conducted herself; and it is further,

ORDERED that pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this court, the respondent, Vivian L. Hausch, shall desist and refrain from (1) practicing law in any form, either as principal or agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4)

holding herself out in any way as an attorney and counselor-at-law; and it is further,

ORDERED that if the respondent, Vivian L. Hausch, has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency and the respondent shall certify to the same in her affidavit of compliance pursuant to 22 NYCRR 691.10 (f).

ENTER:

James Edward Pelzer
Clerk of the Court

SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION SECOND DEPT

I, JAMES EDWARD PELZER, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared the annexed with the original filed in my office on 11/21/02 and that the same is a correct transcription of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on 11/28/02

# APPENDIX F

Appellate Division
Supreme Court of the State of New York
Second Judicial Department
45 Monroe Place
Brooklyn, N.Y. 11201

MEL E. HARRIS
SUSAN H. HARKAVY
MARY-ELLEN SKENYON
DEPUTY CLERKS

A. GAIL PRUDENTI
PRESIDING JUSTICE

MATTHEW KIERNAN
APRILANNE AGOSTINO
ASSOCIATE DEPUTY CLERKS

JAMES EDWARD PELZER
CLERK OF THE COURT

Vivian Hausch
305 Central Avenue
White Plains, NY 10606

January 2, 2008

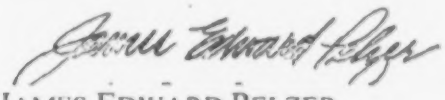
Re: *Matter of Vivian L. Hausch*
App. Div. Docket No.: 2004-06204

Dear Ms. Hausch:

We are in receipt of your Third Supplemental Affidavit filed with the court on December 19, 2007.

Attached to your affidavit is a copy of the court's decision and order dated November 21, 2007, wherein your request for a waiver of the requirement that you submit your income tax returns in connection with your application for reinstatement was denied and you were given 30 days for submission of your income tax returns. I am directed by the court to inform you that compliance with the court's order dated November 21, 2007, and 22 NYCRR 691.11 requires production of copies of your tax returns, not mere proof of filing. Your request for additional time is under consideration.

Yours Truly,



JAMES EDWARD PELZER
Clerk of the Court

JEP/mh

# APPENDIX G

## JURISDICTION. 28 USCS 1257(b)

1257(a). Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

# APPENDIX H

## US CONSTITUTION, AMENDMENT IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

# APPENDIX I

## US CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; or shall any person be subject for the same offence to be twice put in jeopardy of life or lime; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

# APPENDIX J

## US CONSTITUTION, AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

# APPENDIX K

## US CONSTITUTION, AMENDMENT XIV, SECTION 1

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

# APPENDIX L

## SECOND DEPARTMENT REQUIRED REINSTATEMENT AFFIDAVIT 22 NYCRR 691.11

Application for Reinstatement to the Bar After Suspension of One Year or Less

An application pursuant to Judiciary Law § 90 and § 691.11 of the rules of this court for reinstatement to the bar after a suspension from practice of one year or less shall comply with the following requirements:

§ 1. The application shall be made in the form of a motion.

§ 2. The moving papers shall bear the caption and the Appellate Division docket number of the proceeding that led to the movant's suspension.

§ 3. The motion shall be made on notice to the Departmental grievance committee that prosecuted the proceeding leading to the movant's suspension and to the Lawyers' Fund for Client Protection.

§ 4. The motion shall be made, noticed, and filed in accordance with § 670.5 of the rules of procedure of this court. Payment of the $45 fee required by CPLR 8022(b) shall accompany the filing of the motion papers, unless the movant is exempt from payment thereof pursuant to CPLR 1102. Checks shall be made payable to "Clerk of the Court."

§ 5. The motion shall be supported by the affidavit or affirmation of the movant, subscribed and sworn

to or affirmed before a notary public or other person authorized to administer an oath or affirmation.

§6. The supporting affidavit or affirmation shall be worded and numbered as follows:

State of New York )
County of _____ ) ss.:

_____ _____, being duly sworn, deposes and says (or affirms under the penalty of perjury) that:

1. I hereby apply, pursuant to Judiciary Law § 90 and 22 NYCRR 691.11, for reinstatement as an attorney and counselor-at-law licensed to practice in all of the courts of the State of New York.

2. My full name is _____. The name under which I was admitted to the practice of law is _____. My name was changed on the Roll of Attorneys and Counselors-at-Law to _____ by reason of (marriage, divorce or annulment, or a court order legally changing the movant's name). I have also been known by the following names:

3. I was born on (date) in (city, state, country).

4. I currently reside at (street, town or city state, and zip code).

5. The telephone numbers at which I can be contacted are:

Home: _____

Work _____

Mobile _____

6. The e-mail address at which I can be contacted by is _____.

7. I was admitted to the New York State Bar on (date) in the _____ Judicial Department.

8. By opinion and Order of this court dated (date), I was suspended from the practice of law for a period of (__ months/one year). My use of the term "discipline" hereinafter refers to the sanction imposed by this court in the foregoing opinion and order.

9. Other than the location specified in paragraph 4 hereof, I have resided at the following addresses since the effective date of discipline (in reverse chronological order state the approximate dates of residence, street, town or city, state, and zip code):

10. I have also been admitted to practice in the following jurisdictions:

*Certificates of Good Standing, issue within the 30 days preceding the execution of this affidavit (or affirmation) by all such jurisdictions, except those in which I have not been reinstated as set for in paragraph 11 hereof, are attached as exhibit _____ hereto.*

11. Since the imposition of discipline, I have also been the subject of professional discipline in the following other jurisdictions (state the jurisdiction, the date, the nature of the discipline imposed, and whether or not you have been reinstated to practice and are now in good standing in such jurisdiction):

*A copy of each order or judgment imposing such discipline is attached as exhibit _____ hereto. A*

*copy of each order or judgment reinstating me to practice is attached as exhibit _____ hereto.*

12. On the effective date of discipline, the following matters, which were not the basis of this court's opinion and order, were pending against me before any grievance committee in the State of New York (state the nature of the complaint, the disciplinary authority before which it was pending, and the disposition thereof):

13. From the date of my admission to the New York state Bar until the present, the following other disciplinary sanctions have been imposed upon me due to my misconduct as an attorney, in this or any other jurisdiction (state the jurisdiction, the nature of the misconduct, the date, and the nature of the discipline imposed):

14. Since the imposition of discipline, I have engaged in the practice of law in the following other jurisdictions and in the following manner:

15. Since the imposition of discipline, I have engaged in the following businesses (in ascending chronological order, state the dates so engaged, and the name and address of the employer or business):

16. At the time discipline was imposed, I took the following affirmative steps to comply with the order imposing discipline and with 22 NYCRR 691.10:

17. Pursuant to 22 NYCRR 691.10(f), I filed an affidavit of compliance on (date). *A copy of that affidavit of compliance is attached as exhibit _____ hereto.*

- or -

I failed to file an affidavit of compliance as required by 22 NYCRR 691.10(f) for the following reasons(s):

18. There are no unsatisfied judgments against me and/or any corporation or entity of which I am or was a principal, nor have I defaulted in the performance or discharge of an obligation or duty imposed upon me by a court, governmental, or administrative agency, except as follows:

19. Other that the judgments set forth in paragraph 18 hereof, I have incurred the following debts with a balance over $500 that are presently overdue by at least 60 days (state the name and address of each creditor, the nature of the debt, the original amount of the indebtedness and date incurred, the due date, and the balance due):

20. Since the imposition of discipline, I have filed all required Federal, state, and local income tax returns when due or have received an extension to file the same, except as follows:

*Copies of all such returns are attached as exhibit ___ hereto.*

21. Since the imposition of discipline, I have had the following licenses suspended or revoked (state the nature of the license, the name of the licensing authority, the date and reason for the action, and whether the license was revoked or suspended):

22. Since the imposition of discipline, I have been arrested, charged with, indicted, convicted, tried, and/or traffic infractions (state the court, the offense charge, and date and nature of disposition):

23. Since the imposition of discipline, I have suffered from or have treated for a mental or

emotional disorder, alcoholism and/or substance abuse or dependency (state the date or dates of each instance, the name of any health professional or institution consulted or affording treatment, and the circumstances):

24. I was suspended from the practice of law for less than one year, and since the imposition of discipline I have complied with the requirements of 22 NYCRR 691.11(c)(4) by successfully completing one credit hour of continuing legal education (CLR) accredited in accordance with 22 NYCRR part 1500 for each month of suspension.

*Certificates attesting to my completion of the required CLE are attached as exhibit ____ hereto.*

25. I was suspended from the practice of law for one year, and since the imposition of discipline I have complied with the requirements of 22 NYCRR 691.11(c)(3) by:

successfully completing 18 credit hours of continuing legal education (CLE) accredited in accordance with 22 NYCRR Part 1500, at least 6 of which were in the field of attorney ethics.

*Certificates attesting to my completion of the required CLE are attached as exhibit _____ hereto.*

- or -

successfully completing 12 credit hours of continuing legal education (CLE) accredited in accordance with 22 NYCRR Part 1500 and by attaining a passing grade on the Multistate Professional Responsibility Examination.

*Certificates attesting to my completion of the required CLE and proof of passage of the MPRE are attached as exhibit _____ hereto.*

26. Within the 30 days preceding the execution of this affidavit (affirmation), I have read the disciplinary rules set forth in 22 NYCRR Part 1200 of the joint rules of the Appellate Divisions and I have read 22 NYCRR Part 691 of the rules of this court. I am familiar with the provisions of the Code of Professional Responsibility. If reinstated to the practice of law, I will conform my conduct to those rules and the ethical considerations set forth in the Code.

27. Other than the passage of time and the absence of additional acts of misconduct, the following facts establish that I possess the requisite character and general fitness to be reinstated as an attorney and counsel-or-at-law:

28. The following facts, not heretofore disclosed to this court, are relevant to this application and might tend to influence the court to look less favorably upon reinstating me to the practice of law:

29. I understand that the court may take such investigative steps as it deems appropriate to evaluate my character and fitness for reinstatement to the Bar. I will fully cooperate with any request for additional information and make myself available to answer questions under oath or affirmation, as required.

WHEREFORE, I request that the court grant this application for my reinstatement as an attorney and

counselor-at-law licensed to practice in all of the courts of the State of New York.

Dated: (city or town, state)
_____, 200__

_____

Subscribed to and sworn to before me
this _____ date of _____, 200__

_____
Notary Public

§ 7. In completing the supporting affidavit or affirmation, the movant should not omit inapplicable passages. If an entire paragraph is inapplicable, the appropriate answer is "Not Applicable." If portions of the paragraph are inapplicable, the movant may so indicate by the use of strikethrough characters as in the following example:

2. My full name is _____. The name under which I was admitted to the practice of law is _____. ~~My name was changed on the Roll of Attorneys and Counselors at Law to by reason of (marriage, divorce or annulment, or a court order legally changing the movant's name).~~ I have also been known by the following names:

§ 8. The application may be supplemented by the affidavits or affirmations of counsel and character witnesses, and with additional appropriate exhibits.

§ 9. Place the moving papers in the following order:

a. The notice of motion or order to show cause;

b. The applicant's form affidavit or affirmation;

c. The exhibits supporting that form affidavit or affirmation;

d. Any additional supporting affidavits or affirmations and exhibits thereto; and

e. An affidavit of service of the moving papers upon the appropriate Departmental Grievance Committee and the Lawyer's Fund for Client Protection.

# APPENDIX M

## FIRST DEPARTMENT REINSTATEMENT RULE FOR ATTORNEYS SUSPENDED FOR SIX MONTHS OR LESS 22 NYCRR 603.14

§ 603.14. Reinstatement

(a)(1) Unless the Court directs otherwise, any attorney who has been suspended for six months or less pursuant to disciplinary proceedings shall be reinstated at the end of the period of suspension upon an order of the Court. No more than thirty days prior to the expiration of the term of suspension the attorney must file with the Court and serve upon the chief counsel an affidavit stating that the attorney has fully complied with the requirements of the suspension order and has paid any required fees and costs. Upon receipt of the affidavit, the chief counsel shall serve a copy of it upon each complainant in the disciplinary proceeding that led to the suspension and give notice to the complainant(s) that they may submit a response opposing or supporting the lawyer's affidavit. Such response must be filed with the chief counsel within twenty days of the date of the notice. Within thirty days of the date on which the affidavit was served upon the chief counsel, or within such longer time as the Court may allow, the chief counsel may file an affidavit in opposition.

## APPENDIX N

## THIRD DEPARTMENT REINSTATEMENT RULE FOR ATTORNEYS SUSPENDED FOR SIX MONTHS OR LESS 22 NYCRR 806.12

§806.12. Reinstatement

(a) An attorney who has been disbarred or whose name has been struck from the roll of attorneys pursuant to subdivision 4 of section 90 of the Judiciary Law may not apply for reinstatement until the expiration of at lease seven years from the effective date of the disbarment or removal. An attorney who has been suspended may apply for reinstatement upon expiration of the period of suspension. An attorney suspended pursuant to section 806.10 of this Part who applies for reinstatement shall waive any doctor-patient privilege which would otherwise exist, regarding medical or psychiatric care during his disability and shall submit a list of the persons by whom and the facilities at which he received treatment, together with authorizations for the release of records relating thereto. The court may direct the appointment of medical experts to examine the attorney at his own expense.

(b) An application for reinstatement may be granted by this court only upon a showing by the applicant (i) by clear and convincing evidence that he has fully complied with the provisions of the order disbarring or suspending him, or striking his name from the roll of attorneys, and that he possesses the character and general fitness to resume the practice

of law, and (ii) that, subsequent to the entry of such order, he has taken and attained a passing score on the Multistate Professional Responsibility Examination described in section 520.8(a) of the Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law, the passing score thereon being that determined by the New York State Board of Law Examiners pursuant to section 520.8(c) of such rules. A copy of an application for reinstatement shall be served on the committee on professional standards. The committee shall inquire into the merits of, and may be heard in opposition to, the application. The application may be referred to the appropriate committee on character and fitness or to a judge or referee for a hearing and report to the court.

(c) The court in its discretion may direct that an applicant pay the necessary expenses incurred in connection with an application for reinstatement.

## APPENDIX O

## FOURTH DEPARTMENT REINSTATEMENT RULE FOR ATTORNEYS SUSPENDED FOR SIX MONTHS OR LESS PURSUANT TO 22 NYCRR 1022.28

(3) *Necessary Papers.* An applicant for reinstatement shall file an original and 12 copies of the application. When an attorney has been suspended for a period of more than six months, papers on an application for reinstatement following suspension shall include: a notice of motion; a copy of the order of suspension; a copy of the Per Curiam Opinion of the Appellate Division, if any; a completed questionnaire in the form included in Appendix A; proof of successful completion of the Multistate Professional Responsibility Examination described in 22 NYCRR 520.9; and proof of service of one copy of the application on the chief attorney.

When an attorney has been suspended for a period of six months or less, papers on an application for reinstatement following suspension shall include: an affidavit of the suspended attorney demonstrating compliance with the order of suspension and with 22 NYCRR 1022.27; a copy of the order of suspension; a copy of the Per Curiam Opinion of the Appellate Division, if any; and proof of service of one copy of the application on the chief attorney.

The Appellate Division may direct an attorney to file a completed questionnaire in the form included in Appendix A.

## APPENDIX P

## APPELLATE DIVISION, SECOND DEPARTMENT, RULE REQUIRING A MAJORITY OF THE FULL GRIEVANCE COMMITTEE AND PROCEDURE, 22 NYCRR 491.4 (E)

(e) Upon receipt or initiation of a specific complaint of professional misconduct, any such committee may, after preliminary investigation and upon a majority vote of the full committee:

(1) dismiss the complaint and so advise the complainant and the attorney;

(2) conclude the matter by issuing a letter of caution to the attorney and by appropriately advising the complainant of such action;

(3) conclude the matter by privately admonishing the attorney, which admonition shall clearly indicate the improper conduct found and the disciplinary rule, canon or special rule which has been violated, and by appropriately advising the complainant of such action;

(4) serve written charges upon the attorney and hold a hearing on the matter as set forth in subdivision (f) of this section;

(5) forthwith recommend to this court the institution of a disciplinary proceeding where the public interest demands prompt action and where the available facts show probable cause for such action.

# APPENDIX Q

## APPELLATE DIVISION, SECOND DEPARTMENT RULE ESTABLISHING TWO MEMBERS AS CONSTITUTING A QUORUM 22 NYCRR 691.4(D)

(d) Each grievance committee shall have the power to appoint its members to subcommittees of not less than three members, two of whom shall constitute a quorum and shall have power to act. At least two members of a subcommittee shall be attorneys. The chairman of the committee shall designate a member of the subcommittee to act as its chairman. Such subcommittees may hold hearings as hereinafter authorized.

# APPENDIX R

## APPELLATE DIVISION, SECOND DEPARTMENT RULE AUTHORIZING THE CLERK OF THE COURT TO ISSUE SUBPOENAS, 22 NYCRR 691.5(A)

(a) upon application by the chairman or acting chairman of any such committee, or upon application by counsel to such committee, disclosing that such committee is conducting an investigation of professional misconduct on the part of any attorney, or upon application by any attorney under such investigation, the clerk of this court may issue subpoenas, in the name of the presiding justice, for the attendance of witnesses and the production of books and papers before such committee or such counsel or any subcommittee thereof designated in such application, at a time and place therein specified.

Supreme Court, U.S.
FILED
JAN 12 2009
OFFICE OF THE CLERK

No 08-748

117 (2) In The

# Supreme Court of The United States

VIVIAN L. HAUSCH,

*Petitioner,*

- against -

GRIEVANCE COMMITTEE FOR
THE NINTH JUDICIAL DISTRICT,

*Respondent.*

Petition for a Writ of Certiorari to the
New York State Court of Appeals

## BRIEF IN OPPOSITION

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## PRELIMINARY STATEMENT

By order of the Appellate Division, Second Department, dated and entered on October 15, 2004, the Grievance Committee for the Ninth Judicial District was authorized to institute and prosecute a disciplinary proceeding against VIVIAN HAUSCH, an attorney and counselor-at-law, on the basis of a July 19, 2004 petition containing eight charges of professional misconduct. The Court's order further referred the issues raised by the petition and any answer thereto to the Hon. Lawrence J. Tonetti, as Special Referee, "to hear and report."

The Committee's July 19, 2004 petition contained eight (8) charges, six of which were predicated upon appellant Hausch's alleged misconduct in response to zoning code enforcement efforts regarding the use and occupancy of 99 Main Street, Tuckahoe, New York – a storefront office owned by appellant Hausch's client *P&N Tiffany Properties, Inc.* and litigation that resulted therefrom. The remaining charges arose from appellant Hausch's failure to comply with requests, made by the respondent Committee during the course of it's investigation of those matters, that she provide specific information regarding her client and its corporate structure, as well as a request that she come to the respondent Committee's office and give testimony under oath regarding the foregoing matters. Appellant Hausch submitted an answer, dated November 30, 2005, wherein she denied the charges of professional misconduct alleged therein and proffered various legal and factual explanations in defense of her alleged misconduct.

Once issue was joined, and preliminary issues were addressed, the Special Referee conducted hearings in the disciplinary matter, after which both parties were permitted to submit post-hearing memoranda. In its "Proposed Findings," the respondent Committee conceded that it could not prove Charges Four, Five, Six, and Seven of the petition as drafted, and that said charges should therefore be withdrawn and/or dismissed. The Special Referee thereafter adopted the proposed report of the respondent Committee, and submitted his findings in a November 14, 2005 report to the Appellate Division, Second Department. Therein he concluded that Charges One, Two, Three, and Eight of the petition should be sustained.

The parties thereafter each moved to confirm and/or disaffirm as their respective interests dictated. By order of the Appellate Division, Second Department, dated and entered on November 21, 2006, that Court found that Charges One, Two, Three and Eight of the petition had been correctly sustained, and that appellant Hausch had engaged in professional misconduct, including:

(a) conduct prejudicial to the administration of justice and/or which adversely reflected upon her fitness as a lawyer on the basis of her failure to cooperate with the lawful directives of the Village of Tuckahoe, and

(b) additional conduct prejudicial to the administration of justice and/or which adversely reflected upon her fitness as a lawyer on the basis of her failure to cooperate with the lawful demands of the respondent Committee and its efforts to investigate her conduct with respect to

the Village of Tuckahoe, and

(c) disregarding and/or counseling her client to disregard one or more rulings made by a tribunal in the course of a proceeding, and

(d) conduct involving dishonesty, fraud, deceit, or misrepresentation on the basis of material misrepresentations she made to the respondent Committee and/or other local and state government authorities regarding the location of her law office.

Based upon these findings, the Appellate Division, Second Department ordered that appellant Hausch be suspended from the practice of law for a period of six (6) months, effective December 21, 2006. *Matter of Hausch*, 36 A.D.3d 141; 825 N.Y.S.2d 109; 2006 N.Y. App. Div. LEXIS 13859 (2d Dep't, 2006)(see Appellant's Appendix E).

On December 14, 2006, the New York State Court of Appeals declined to sign an Order to Show Cause presented by the appellant Hausch as part of her application for a stay of the November 21, 2006 Opinion and Order of the Appellate Division, Second Department. Appellant Hausch thereafter filed an application seeking leave to appeal to the New York State Court of Appeals on the same date. This application to the New York State Court of Appeals for permissive leave to appeal was denied in an Order dated January 9, 2007. *Matter of Hausch*, 8 NY3d 801, 828 NYS2d 292 (NY, 1/9/07).

On June 22, 2007, appellant Hausch moved before the Appellate Division, Second Department for reinstatement to the practice of law at the conclusion of her six-month suspension. The respondent Committee immediately filed an "Affirmation in

Response," citing the fact that, among other things: (a) appellant's reinstatement application was not in the form required by 22 NYCRR §691.11, (b) she had failed to provide copies of her state and federal income tax returns for the period of her suspension, and (c) failed to provide proof that she had completed sufficient continuing legal education credits required under 22 NYCRR §691.11. However, it took no position upon whether or not appellant's petition for reinstatement should be granted.

Upon information and belief, the Clerk of the Appellate Division, Second Department thereafter rejected appellant Hausch's June 22, 2007 papers on the basis of her failure to follow the required format specified in 22 NYCRR §691.11. The respondent Committee's "Affirmation in Response" was also returned by the Court at or about the same time. However, appellant Hausch, having been served with a copy of the respondent Committee's "Affirmation in Response," thereafter served and filed a "Supplemental Affidavit," in what appeared to be an effort to comply with the format dictated by 22 NYCRR §691.11.

Once again, the respondent Committee prepared a response, which it denominated as a "Supplemental Affirmation in Reply," wherein it again highlighted the various ostensible deficiencies in appellant Hausch's latest submission[1], but continued to take no position

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[1] Including the filure to provide tax returns, proof of completion of required Continuing Legal Education courses, or any other explanation regarding a judgment for unpaid taxes entered against her client *P&N Tiffany Properties* by the NYS Tax Commission. Appellant's role in corporate structure of *P&N Tiffany Properties* was one of the issues appellant Hausch steadfastly refused to provide any information about during the

upon appellant Hausch's application for reinstatement itself. Upon information and belief, appellant Hausch's "Supplemental Affidavit" was again deemed unsuitable for filing and also returned to her by the Clerk of the Appellate Division. However, the respondent Committee's "Supplemental Affirmation in Reply" was not returned and was, instead, upon information and belief, retained in the Appellate Division, Second Department's docket file for future reference.

Appellant Hausch thereafter filed yet another motion for reinstatement, dated July 13, 2007, with the Appellate Division, Second Department. Appellant Hausch's July, 2007 application was supported by an attached affidavit that (a) asserted compliance with the CLE requirements by virtue of her having completed a CLE course on July 11, 2007, but (b) was otherwise essentially the same "Supplemental Affidavit" previously rejected by the Appellate Division, Second Department.

On July 16, 2007, the respondent Committee advised the Clerk of the Appellate Division, Second Department that the concerns cited in its previously submitted and retained "Supplemental Affirmation in Reply" were equally applicable to both of appellant Hausch's two most recent submissions and that, therefore, no new papers would be submitted in response to the July 13, 2007 motion at that time.

On or about September 29, 2007, appellant Hausch served and filed a "Second Supplemental Affidavit" with the Appellate Division, Second Department, wherein she again petitioned that court for reinstatement on essentially the same petition, but now sought a waiver of the requirement that she

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course of the underlying disciplinary proceeding.

submit copies of her tax returns with that application. The respondent Committee prepared and submitted an "Affirmation in Reply," dated October 9, 2007, wherein it reiterated the same concerns expressed earlier and submitted that appellant Hausch should be held to the same standard of compliance with 22 NYCRR §691.11 as every other attorney reinstatement applicant. However, once again, the respondent Committee took no position upon appellant Hausch's application for reinstatement, relying instead upon the Court's discretion to determine it in the interests of justice.

On November 21, 2007, the Appellate Division, Second Department issued a "Decision and Order on Motion for Reinstatement" wherein it formally denied appellant Hausch's application for a waiver of the requirement that she submit her tax returns and held her application for reinstatement in abeyance for a period of 30 days pending her submission of same. *Matter of Hausch,* NYSlipOp 84168(U) (2d Dep't, 2007) (see Appellant's Appendix D).

On December 18, 2007, appellant Hausch filed yet a "Third Supplemental Affidavit," with the Appellate Division, Second Department, wherein she asserted that proof of filing was all that the rule required and claimed[2] that she had documented her proof of same with respect to her federal tax returns. Once again, the respondent Committee submitted yet another "Affirmation in Reply," dated December 26, 2007, wherein it again highlighted its ongoing concerns, including the similarity between appellant Hausch's conduct in this matter and the conduct that led to her

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[2] In fact, all respondent did was provide proof that she had requested proof of filing of her returns. No proof of actual filing at was provided to the court.

suspension from practice, but otherwise took no position upon respondent's application.

On January 2, 2008, the Clerk of the Appellate Division, Second Department advised appellant Hausch in writing that, *inter alia*, compliance with that Court's November 21, 2007 order and 22 NYCRR §691.11 would require the production of copies of her tax returns and not mere proof of filing (see Appellant's Appendix F). On January 9, 2008, appellant Hausch submitted a "Fourth Supplemental Affidavit," wherein she advised the court that *"regrettably, I cannot submit my income tax returns to the court in order to be reinstated as a lawyer."* In a "Decision and Order on Motion for Reinstatement," dated February 22, 2008, appellant Hausch's application for reinstatement was finally denied by the Appellate Division, Second Department. *Matter of Hausch*, 2008 NYSlipOp 64537(U)(2d Dep't, 2008)(see Appellant's Appendix C).

On April 10, 2008, appellant Hausch filed a "Motion for Leave to Appeal" with the New York State Court of Appeals, seeking permissive leave to appeal from the February 22, 2008 Order of the Appellate Division, Second Department. The respondent Committee opposed this application in an "Answer in Opposition to Motion for Permissive Leave to Appeal," dated April 18, 2008. The New York State Court of Appeals in an Order dated and entered June 10, 2008 thereafter denied appellant Hausch's application for permissive leave to appeal. *Matter of Hausch*, 10 N.Y.3d 713; 891 N.E.2d 308; 861 N.Y.S.2d 273; 2008 N.Y. LEXIS 1507;2008 NYSlipOp 74142 (NY, 2008)(see Appellant's Appendix A).

On July 10, 2008, appellant Hausch moved for re-

argument of the June 10, 2008 decision by the New York Court of Appeals and the respondent Committee thereafter filed opposition papers, dated July 18, 2008. Appellant Hausch's motion for reargument was thereafter denied in an Order, issued by the New York State Court of Appeals, dated and entered September 9, 2008. *Matter of Hausch*, 11 N.Y.3d 760; 894 N.E.2d 1194; 864 N.Y.S.2d 804; 2008 N.Y. LEXIS 2658; 2008 NYSlipOp 74142 (NY, 2008)(see Appellant's Appendix B).

## ARGUMENT

## POINT I

### Appellant Has Not Presented A Question Appropriate For This Court's Review

While couched in constitutional allegory, appellant Hausch seeks nothing more than appellate review of the Appellate Division, Second Department's refusal to reinstate her to the practice of law on her own stubbornly dictated terms when she has failed to meet her burden of proving her character and fitness under the expressly stated requirements of 22 NYCRR §691.11.

In the first of the two "Reasons for Granting the Writ" proffered by appellant Hausch. she endeavors to persuade this honorable Court that her right to privacy under the United States Constitution has been unjustly infringed 22 NYCRR §691.11 where it requires copies of her tax returns in her application for reinstatement to the practice of law. However, 26 USC §6103 did not create and does not embody the sweeping, constitutionally guaranteed, absolute, right

to privacy of all income tax returns and taxpayer information that appellant would have this honorable Court believe.

In fact, the confidentiality and non-disclosure obligations in that section apply to only the Internal Revenue Service ("IRS") and not the individual taxpayer or other private parties. Moreover, the provisions of 26 USC §6103 itself contain numerous exceptions to the statutory confidentiality embodied therein, each of which permits the Internal Revenue Service to reveal that information to various federal and state agencies under a variety of conditions and circumstances. What 26 USC §6103 does not contain, however, is any provision that would bar an individual taxpayer from voluntarily providing such information when requested to do so.

Consistent with this view, it has been repeatedly held that tax returns in the hands of the taxpayer are not privileged and therefore discoverable. In *St. Regis Paper Company v. U.S.*, 368 U.S. 208, 219, 82 S.Ct. 289 (1961), this honorable Court held that tax returns in the taxpayer's possession were discoverable in litigation. In *Heatherman v. USDC For The Central District*, 503 F2d 1032 (9th Circuit, 1974), the 9th Circuit Court of Appeals again held that 26 USC §6103 applies only to the release of tax information by the government while concluding that tax returns in the taxpayer's possession are not privileged and not subject to its restrictions. Similarly, in *Maggio v. Hynes*, 423 F.Supp 144 (EDNY, 1976), the United States District Court for the Eastern District of New York held that even tax returns in the possession of the taxpayer's accountant are not privileged or barred from discovery by 26 USC §6103 while finding no merit

to the taxpayer's claim that discovery of the returns violated the taxpayer's rights to privacy and/or freedom from unreasonable search and seizure under the United States Constitution.

Clearly, the requirement that an attorney seeking reinstatement submit copies of his/her tax returns does not invade any constitutionally protected right to privacy. In the instant matter, 22 NYCRR §691.11 requires only that attorneys (i.e. the taxpayers) seeking reinstatement provide copies of their tax returns for the period during which they were suspended or disbarred. Since the confidentiality imposed by 26 USC §6103 applies only to the IRS, and 22 NYCRR §691.11 seeks only tax returns and information directly from the taxpayer, there is neither a constitutional nor statutory prohibition to this rule.

Moreover, the requirement that attorney reinstatement applicants provide tax returns at some point in the reinstatement process is hardly unique. Upon information and belief, outside of New York, at least thirteen (13) other states[3] require reinstatement applicants to submit tax returns for use in assessing the character and fitness of disciplined attorneys seeking reinstatement to the bar. Within New York, the Appellate Division, First Department, requires that tax returns must be provided by attorneys seeking reinstatement after a period of suspension greater than six (6) months while the Second, Third, and Fourth Appellate Departments each require the

[3] Arizona, California, Indiana, Louisiana, Massachusetts, Maryland, Pennsylvania, Oregon, Oklahoma, Rhode Island, Utah, Virginia, and Wisconsin.

production of tax returns as part of any application for reinstatement, regardless of the length of the applicant's suspension. See 22 NYCRR §603.14 [1st Dep't]; 22 NYCRR §691.11 [2d Dep't]; 22 NYCRR §806.12 [3d Dep't]; and 22 NYCRR §1022.28(3) [4th Dep't]; 22 NYCRR §603.14 [1st Dep't], 22 NYCRR §691.11 [2d Dep't]; 22 NYCRR §806.12 [3d Dep't]; and 22 NYCRR §1022.28(3) [4th Dep't].

This *de minimus* difference does not, however, rise to the level of unequal treatment suggested by appellant. Instead, it merely reflects the fact that, in New York, the four Appellate Divisions of the New York State Supreme Court have exclusive jurisdiction over attorney disciplinary matters within their respective departments. See NY CLS Jud §90(2); see also *Mildner v. Gulotta*, 405 F.Supp 182, 188 (EDNY 1975), affirmed 425 US 901 (USNY 1976). Since reasons of policy regarded as significant by one Appellate Department in their effect on the conduct of attorneys may not prevail in another Department, *because* of differing conditions in those jurisdictions, it has been held that the rules governing the conduct of attorneys licensed to practice law before those courts may vary. Nothing in the Constitution or statutes guarantees that different jurisdictions must adhere to identical procedures. *Matter of Walker*, 113 AD2d 254, 356 (1st Dep't 1985).

Nor is such a requirement unreasonable where an attorney's character and fitness to practice law is at issue. A special relationship exists between the attorney and the court that grants him or her a license to practice law before it. *"No other body is as well qualified or as interested in determining whether an attorney is qualified to practice law."* See *Javits v.*

*Stevens*, 382 F. Supp. 131, 141 (S.D.N.Y. 1978). Thus, state courts have traditionally been allowed wide discretion in the establishment and application of standards of professional conduct and moral character to be observed by their court officers. *Erdman v. Stevens*, 458 F2d 1205 (2d Cir., 1972) *Cert. denied* 409 U.S. 889, 93 S. Ct. 126 (1972). What appellant Hausch fails to grasp is that it is the Appellate Division, and not she, who determines what is required to establish an attorney's character and fitness to engage in the practice of law.

Where the character and fitness of an attorney to practice law is at issue, tax returns and the information they contain provide the Courts with substantial information about the applicant's conduct during the period of suspension, including but not limited to: (a) how the applicant has earned a living, (b) the completeness and timeliness of the applicant's compliance with any income reporting and tax payment obligations, and (c) whether or not the applicant has held oneself out as an attorney to the government or other third parties, during the period of suspension or disbarment. Such information also affords corroboration and confirmation of other claims made by the disciplined attorney applicant as part of their reinstatement application, a particularly valuable tool where the applicant, like appellant Hausch, has been previously found guilty of conduct prejudicial to the administration of justice and/or conduct involving dishonesty, fraud, deceit, or misrepresentation.

Ultimately, appellant Hausch grossly misleads this honorable court where she suggests that attorneys are forced to choose between giving up their

constitutional rights and giving up their rights to make a living. What appellant Hausch fails to grasp is that the ability to practice law in the State of New York is not a right, but rather a privilege, burdened with conditions, surrounded with a public interest, and vested with a private responsibility. *Theard v. U.S.*, 354 U.S. 278 (1957), citing *Matter of Rouss*, 221 N. Y. 81, 84, 116 N. E. 782, 783; See also: *Matter of Dondi*, 63 N.Y.2d 331 (1984); *Matter of Capoccia*, 59 N.Y.2d 549, 552-553 (1983); *Matter of Wysell*, 10 AD2d 199 (1st Dep't, 1960).

If appellant Hausch wishes to regain the privilege of practicing law in New York State, she must first satisfy the Court by clear and convincing evidence that she has both complied with the provisions of the order suspending her and that she now possesses the requisite character and general fitness to resume the practice law. 22 NYCRR §691.11(c)(1). The public must be protected *"in its reliance upon the integrity and responsibility of the legal profession."* *Matter of Wysell*, supra, citing *Matter of Gould*, 4 AD2d 174,175.

Yet, appellant Hausch has utterly, completely, and totally failed to meet that burden, even after multiple opportunities were afforded to her by the reviewing court and her obligations were repeatedly and clearly explained to her. The denial of her reinstatement application is the direct result of her own deliberate, knowing, willful and contumacious refusal to undertake the necessary acts, provide the required information, and follow the procedures required to persuade the Court of her fitness to practice law. She should not now be heard to complain about the denial of that relief when such was directly

engineered by her own stubbornly foolish actions.

There is no basis upon which appellant Hausch's instant petition can or should be granted and her petition must therefore be denied.

## POINT II

## APPELLANT IS TIME BARRED FROM SEEKING CERTIORARI ON THE BASIS OF HER SECOND REASON

In the second of appellant's "Reasons for Granting the Writ," she endeavors to reprise and relitigate the very same issues she failed to prevail on in the underlying disciplinary hearing in this matter.

Virtually all of these issues (with the exception of the grossly scandalous and totally baseless accusations she makes against the petitioner's staff counsel) were previously the subject of appellant's December, 2006 application for permissive leave to appeal to the New York State of Court of Appeals. The New York State Court of Appeals in its order of January 9, 2007 denied that application. *Matter of Hausch*, 8 NY3d 801, 828 NYS2d 292 (NY, 1/9/07).

Accordingly, appellant was already time barred from petitioning for further appellate review of that determination at the time she began the reinstatement process. Moreover, while those issues were not raised, at any time, during the course of appellant's failed attempt at reinstatement, she nevertheless included them in her March, 2008 application to the New York Court of Appeals for leave to appeal from the order denying her petition for reinstatement. In its response to that application, the respondent Committee argued

that the January 9, 2007 order was *res judicata* therein and that appellant was therefore estopped by virtue thereof from again litigating those same arguments and issues in her latest application for permissive leave to appeal.

By trying to renew an already time-barred claim, appellant seeks to deceive this honorable Court into granting certiorari on the basis of issues and claims that she would not otherwise be legally able to argue.

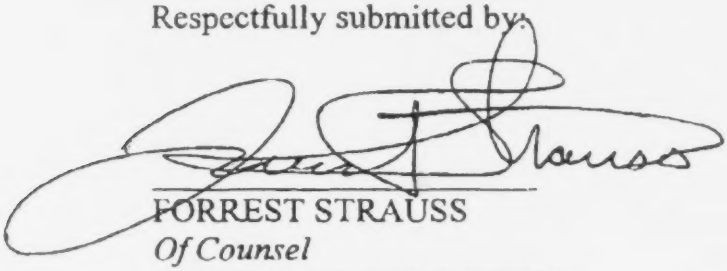
Accordingly, respondent-appellant's application on these grounds should be denied in its entirety.

## CONCLUSION

Appellant Hausch has failed to articulate any grounds that would justify her petition for a Writ of Certiorari to this honorable Court herein. Accordingly, it is respectfully submitted that appellant Hausch's application should be dismissed in its entirety.

Dated: January 12, 2009
White Plains, New York

Respectfully submitted by:



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No. 08-748

Supreme Court, U.S.
FILED
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In the

# Supreme Court of the United States

VIVIAN L. HAUSCH,

*Petitioner,*

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

*Respondent.*

**On Petition for Writ of Certiorari to the New York State Court of Appeals**

## REPLY

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January 19, 2009

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## STATEMENT

The petitioner's response to the respondent's Preliminary Statement follows. Page references are to its brief.

Page 1: Six of the eight charges were not predicated upon the petitioner's alleged misconduct in response to zoning code enforcement efforts. Proof of this is that the respondent submitted CPLR Article 78 proceeding papers at the hearing and refused petitioner's demand to make the record from the village court proceedings against her and her corporate client part of the record in the disciplinary hearing.

Pages 2-3 (a) and (b): References to "lawful directives of the Village of Tuckahoe" and petitioner's "conduct with respect to the Village of Tuckahoe" are improper because all of the informations issued against the petitioner were dismissed and the village justice was unanimously reversed on appeal.

Page 4, footnote: Part of the record in the Appellate Division is documentation proving compliance with continuing legal education requirements, which is part of an application for reinstatement to practice. There are no outstanding judgments against P&N Tiffany Properties Inc. The respondent submitted an internet paper showing *PAN* Tiffany Properties Inc. owed the state tax commission $767.00 on 2/8/05. The Appellate Division took no issue with the petitioner's statements on these matters.

Pages 2-7: The petitioner had to resubmit her application for reinstatement because (1) she was initially unaware that the Second Department had recently rewritten its rules to require a form affidavit and (2) she had not received the rejected application back from the court when she submitted her supplemental affidavit using the proper form. This supplement was rejected because there was no application before the court to supplement. The court did, however, retain for the record the respondent's opposing papers, even though there was no application to oppose. The petitioner then submitted a third set of papers, which the court accepted. Subsequent affidavits were necessary because of the clerk's letter and telephone call. The petitioner's final affidavit made it clear to the court that she would not submit her income tax returns because the court was violating her right to privacy, not because she had something to hide.

## REASONS FOR GRANTING THE WRIT

I. *Requiring the Submission of Income Tax Returns as Part of a Motion for Reinstatement to the Practice of Law Is a Violation of an Attorney's Constitutional Rights When the Grounds for Suspension Were Not Directly or Indirectly Related to Financial Issues.*

Income tax returns are discoverable "only where a litigant himself tenders an issue as to the amount of his income." *Kingsley v. Delaware, L&W RR. Co.* 20 FRD 156 (SDNY 1957).

To obtain someone's tax records, one must show they are necessary, material, and relevant. *Slate v. Slate* 267 AD2d 839, 699 NYS2d 824 (3d Dept. 1999).

Whereas 26 USC 6103 does not provide for absolute privilege of income tax returns, there is a valid public policy against their disclosure "grounded in the interest of the government in full disclosure of all the taxpayer's income which thereby maximizes revenue. To indiscriminately compel a taxpayer to disclose this information merely because he has become a party to a lawsuit would undermine this policy." *Federal Savings & Loan Assn. v. Krueger* 55 FRD 512 (ND Ill. 1972).

The form affidavit required by the Appellate Division, Second Department, as part of an application for reinstatement to practice is reprinted in its entirety in Appendix L of the petition at pages 25a-32a.

The drafter of the form, the Second Department, clearly attached the income tax return disclosure to paragraph 20, which specifically addresses whether tax returns were filed or, in lieu thereof, whether a filing extension was obtained. By the clear wording of the form, the drafter cared about filing. If a filing extension was obtained, there would be no tax return available to submit. Filing was clearly the only issue.

The respondent may not now offer other reasons for disclosure. However, if the information sought were whether the petitioner had done any

work between the suspension date of December 21, 2006, and the end of the tax year December 31, 2006, the request for income tax returns would be attached to paragraph 14 or 15, the paragraphs that deal with these issues and which, obviously, precede paragraph 20. Further, if there were multiple reasons for demanding income tax returns, the demand would be a separate paragraph at the beginning or the end of the form.

An income tax return does not show all that the respondent assumes it does. In addition, for all but ten days of the reporting year, the petitioner was practicing law in New York State. Further, the petitioner was and still is an attorney in that she is admitted to practice in this honorable court.

*St. Regis Paper Company v. U.S* 368 US 208, 82 S.Ct. 289 (1961) does not apply because it was the Census Act that was at issue, not the Constitution. Even so, Congress rewrote the Census Act to prohibit disclosure after the case was decided because so many Americans then refused to fill out the forms knowing the information was obtainable by others.

*Heatherman v. USDC for the Central District of California* 503 F2d 1032 (9th Cir. 1974) is distinguishable because it was decided on FRCP 26(b)(1) grounds. Even so, the court held that tax returns are discoverable only "in appropriate circumstances." In his dissent, Justice Chambers stated that tax returns are not discoverable unless the taxpayer puts them at issue by litigating issues concerning his or her income.

*Maggio v. Hynes* 423 F.Supp. 144 (EDNY 1976) does not apply because at issue were (1) whether a third party can claim a Fourth and Fifth Amendment privilege against disclosure of a person's tax returns and (2) whether the plaintiff had met the high standard required for injunctive relief, issues not in the instant case. In his dissent, Justice Douglas stated that those amendments "delineate a sphere of privacy, protected from government intrusion," which protects records provided to one's accountant.

*Mildner v. Gulotta* 405 F.Supp. 182 (EDNY 1975), *affd.* 425 US 901, 96 S.Ct. 1489 (1976) does not apply because (1) the court dismissed the plaintiff attorney's complaint on grounds of abstention and (2) the case involved imposition of discipline, not standards for reinstatement to practice. The court stated that the Referee's duty is to file a report which sets forth his findings of fact and conclusions of law along with the transcript of the proceedings.

*Matter of Walker* 113 AD2d 254 (1st Dept. 1985) does not apply because the issue involved disbarment and comingling of funds.

*Javits v. Stevens* 382 F.Supp. 131 (SDNY 1978) does not apply because the issue before the court involved the Civil Rights Act, 42 USCS 1983 and FRCP 12(b)(6), neither of which are at issue herein.

The petitioner agrees with the respondent that the Appellate Division has exclusive power to

resolve issues of misconduct. *Erdman v. Stevens* 458 F2d 1205 (2d Cir. 1972), *cert. denied* 409 US 889, 93 S.Ct. 126 (1972). Requirements for reinstatement ought to be uniform among departments as are standards for admission. At the very least, all must pass constitutional muster and be subject to review on the grounds of other applicable statutes and case law.

In *Theard v. U.S.* 354 US 278, 77 S.Ct. 1274 (1957), citing *Matter of Rouss* 221 NY 81, 116 NE 782 (1917), the attorney prevailed in the instant court. The petitioner takes no issue with the Court of Appeals order confirming disbarment of the attorney for causing a witness to be out of town and unavailable for trial.

The attorney also prevailed in *Matter of Dondi* 63 NY2d 331, 482 NYS2d 431 (1984). In dismissing the grievance committee's complaint against the attorney because of improper disclosure, the Court of Appeals held that a disclosure order must be "subject to meaningful review" on appeal. Because the Appellate Division's order was not "legally cognizable," the Court of Appeals dismissed the grievance committee's complaint in its entirety.

*In Matter of Capaccia* 59 NY2d 549, 466 NYS2d 268 (1983), the attorney prevailed. The Court of Appeals reversed the Appellate Division order suspending the attorney because the Appellate Division had denied the attorney the right to have a public trial.

The petitioner agrees with the respondent that the practice of law "is a privilege surrounded with public interest but vested as well with a private responsibility." *Matter of Wysell* 10 AD2d 199 (1st Dept. 1960).

The petitioner cannot address the respondent's claim regarding thirteen other states because the respondent has again failed to provide citations, failed to specify judicial departments, and failed to specify whether disbarment or suspension was at issue and, if the latter, after what period, and whether tax returns are related to the grounds for discipline. Even so, it appears that thirty-six states do not require them.

The respondent's statement that the First, Third, and Fourth departments of New York State require the submission of tax returns is a blatant falsehood. Those departments' rules for reinstatement are reprinted as Appendices M, N, and O of the petition. The rules speak for themselves.

The instant case is unique because (1) the entity forcing the disclosure is a government entity, the judiciary, for its own use and not the use of a litigant, (2) the income tax returns are not relevant to the grounds on which the petitioner was disciplined, (3) the petitioner did not put her tax returns in issue, (4) the court never articulated a reason to have the tax returns, (5) by the Second Department's own wording, the tax returns are to prove filing, and proof could have been had by a less restrictive means, (6) the respondent, which is a

committee of the Second Department, has demonstrated an extraordinary interest in the petitioner's private life by going through her personal mail at her home, sitting outside her home and watching her, and following her around in a vehicle.

II. *An Attorney May Not Properly Be Denied Reinstatement to the Practice of Law When She Has Been Treated Differently From Other Attorneys.*

The doctrine of *res judicata* does not apply because neither the Appellate Division nor the Court of Appeals has ruled on these issues, or even addressed them.

A statute of limitations time bars a party's remedy. The facts are still the facts. The petitioner is presenting earlier facts to show a course of conduct culminating in the recent denial by the Appellate Division, Second Department, of petitioner's application for reinstatement to the practice of law, which was timely appealed to the Court of Appeals and timely appealed to the instant court, as well as to rebut the respondent's claim that the petitioner wants to be treated differently from other attorneys.

With one exception, the respondent has not rebutted the facts in the petition when presented to the Special Referee in papers or testimony, to the Appellate Division, or to the Court of Appeals. The one exception was to the Court of Appeals on the issue of Mr. Strauss' gaining of a position on the

bench. If truthful, his statement shows he never spoke directly to Judge Fuller.

There is a recent case related to the petitioner's argument regarding the Appellate Division, Second Department, and the clerk of that court.

In *Kaufman v. Kaye and Prudenti* LEXIS 25351 (EDNY 2005), affd. 466 F2d 83 (2d Cir. 2006), *cert. denied* 127 S.Ct. 1828, 167 L.Ed.2d 320 (2007), the plaintiff alleged that Chief Clerk Pelzer had assigned two Appellate Division, Second Department, justices to four of five of his cases and one justice to three of five of his cases because they were biased and would rule against him on appeal. The case was dismissed on jurisdictional grounds. In dicta, the court stated that the Appellate Division, Second Department is not required to assign cases on a random basis, and to prove bias a litigant must show the bias stemmed from "non-juridical data." The three justices were Justice Krausman, Justice Adams, and Justice Crane. Justice Adams was on the panel of *P&N Tiffany Properties Inc. v, Maron, et al.* 34 AD3d 548, 823 NYS2d 676 (2d Dept. 2006), the one appeal by P&N Tiffany Properties Inc. that was not assigned to Justice Miller. Justice Adams and Justice Crane were on the panel that issued the opinion and order that suspended the petitioner from the practice of law. (Petition Appendix E, at p. 7a.)

## CONCLUSION

For the reasons set forth above and in the petition, it is respectfully submitted that the petition for a writ of certiorari ought to be granted.

Dated: White Plains, New York
January 19, 2009

Respectfully submitted,

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